

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER P. SOMMER, an individual,) Case No. 07-2846 SC  
by and through his Guardian ad )  
Litem, CHRISTIAN SOMMER, )  
Plaintiff, ) ORDER GRANTING  
v. ) DEFENDANTS' MOTION TO  
UNUM, UNUM PROVIDENT CORPORATION; ) DISMISS  
UNUM PROVIDENT LIFE INSURANCE )  
COMPANY OF AMERICA; FIRST UNUM LIFE )  
INSURANCE COMPANY OF AMERICA; PAUL )  
REVERE LIFE INSURANCE COMPANY, )  
Defendants. )

**I. INTRODUCTION**

This matter comes before the Court on a Motion to Dismiss ("Motion") filed by the defendants Unum et al., ("Defendants" or "Unum"). See Docket No. 20. The plaintiff Alexander P. Sommer ("Plaintiff" or "Sommer") filed an Opposition. See Docket No. 23. For the following reasons, the Court GRANTS Defendants' Motion to Dismiss.

**II. BACKGROUND**

The facts of this case have been exhaustively detailed in the three prior cases that comprise the history of the present action. The parties familiarity with the facts is assumed and the Court

1 discusses only those relevant to the present Motion. It is  
2 nonetheless worth emphasizing that this represents the sixth time  
3 that a federal court has considered Sommer's claims against Unum.<sup>1</sup>

4 In 1996 Sommer sued Defendants for their denial of disability  
5 benefits and the Honorable Judge Jenkins granted summary judgment  
6 against Sommer. See Sommer v. Unum Life Ins. Co., Docket No. 93  
7 CV 96-2407 (N.D. Cal. June 17, 1997) (Sommer I). Sommer appealed  
8 the decision and the Ninth Circuit, in an unpublished opinion,  
9 affirmed the district court's decision. See Sommer v. Unum Life  
10 Ins. Co., 173 F.3d 861, 1999 WL 173570, at \*1 (9th Cir. 1999).

11 In November 1997, Sommer filed another action in district  
12 court against Defendants and the Honorable Judge Armstrong granted  
13 summary judgment against Sommer. See Sommer v. Unum Life Ins.  
14 Co., Docket No. 43 CV 97-4159 (N.D. Cal. March 27, 1998) (Sommer  
15 II). Sommer appealed this decision and the Ninth Circuit, in an  
16 unpublished companion opinion to Sommer I, affirmed the district  
17 court's decision. See Sommer v. Unum Life Ins. Co., 173 F.3d 861,  
18 1999 WL 173592 at \*1 (9th Cir. 1999) (stating "Sommer's claims are  
19 barred by the doctrine of res judicata").<sup>2</sup>

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21 <sup>1</sup> Although the claims have varied slightly, and Sommer raises  
22 new claims in the present case, all claims are derived from the  
23 same nucleus of operative facts; namely Unum's denial of Sommer's  
24 disability benefits.

25 <sup>2</sup> Ninth Circuit Rule 36-3 states that unpublished opinions  
26 may not be cited and are not precedent except as follows:

27 (i) They may be cited to . . . by any  
28 other court in this circuit when relevant  
under the doctrine of law of the cases or  
rules of claim preclusion [res judicata]  
or issue preclusion. (ii) They may be  
cited to . . . for factual purposes, such  
as to show . . . sanctionable conduct . .

1 In April 2000 Sommer filed yet a third complaint in federal  
2 district court and the Honorable Judge Armstrong dismissed on res  
3 judicata grounds. See Sommer v. Unum Life Ins., Docket No. 26 CV  
4 00-1368 (N.D. Cal. January 8, 2001) (Sommer III). Sommer appealed  
5 and in another unpublished opinion the Ninth Circuit affirmed,  
6 stating, "[t]hese cases are concluded." Sommer v. Unum Life Ins.  
7 Co., 35 Fed. Appx. 489, 493 (9th Cir. 2002).

8  
9 **III. DISCUSSION**

10 **A. Legal Standard**

11 A motion to dismiss tests the legal sufficiency of the claims  
12 asserted in the complaint and "all factual allegations are to be  
13 taken as true and construed in the light most favorable to the  
14 non-moving party." Levine v. Diamanthuset, Inc., 950 F.2d 1478,  
15 1482 (9th Cir. 1991). Dismissal "is proper only where it appears  
16 beyond doubt that the plaintiff can prove no set of facts in  
17 support of his claim which would entitle him to relief." Id.  
18 (internal citations and quotations omitted).

19 Defendants have moved to dismiss based on res judicata. "In  
20 order to bar a later suit under the doctrine of res judicata, an  
21 adjudication must (1) involve the same claim as the later suit,  
22 (2) have reached the final judgment on the merits, and (3) involve  
23 the same parties or their privies." Nordhorn v. Ladish Co., Inc.,  
24 9 F.3d 1402, 1404 (9th Cir. 1993). "[T]he doctrine of res  
25 judicata (or claim preclusion) bars all grounds for recovery which

26  
27 ., entitlement to attorneys' fees, or the  
28 existence of a related case. . . .

could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982) (internal quotations and citations omitted) (alterations in original).

**B. Analysis**

**1. Res Judicata**

The parties in the present suit are the same parties from Sommer I. Sommer does not allege otherwise. Nor is there any dispute that the prior adjudications reached final judgments on the merits. Thus, the primary issue before the Court is whether the previous Sommer cases involved the same claims as the present action.

In determining whether two suits contain the same claims, courts examine the following criteria:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether the two suits involve infringement of the same right; (3) whether substantially the same evidence is presented in the two actions; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Nordhorn, 9 F.3d at 1405. "The last of these criteria is the most important." Costantini, 681 F.2d at 1202.

In the First Amended Complaint in Sommer I, Sommer alleged two causes of action under ERISA: (1) breach of contract under 29 U.S.C. § 1132(a)(1)(B), to recover benefits owed to him under the

1 terms of the benefit plans, and (2) equitable relief under 29  
2 U.S.C. § 1132(a)(3), seeking to compel Defendants to pay him  
3 future benefits owed under terms of Defendants' respective  
4 policies. See Mot., Burnite Decl., Ex. 3, First Am. Comp. ¶¶ 19,  
5 23; Ex. 4, Order from Sommer I at 3. This action arose out of  
6 Defendants' denial of disability benefits. See Sommer I, CV 96-  
7 2407, at 2-3 (stating "Plaintiff . . . alleges that defendants  
8 wrongfully breached, and continue to breach, their obligations to  
9 pay plaintiff disability insurance benefits due under his  
10 employers' group policies").

11 In the present action, Sommer asserts four causes of action:  
12 (1) civil RICO violations; (2) unfair business practices under the  
13 California Unfair Business Practices Act; (3) indemnity; and (4)  
14 punitive damages.

15 **a. RICO Violations**

16 The elements of a civil RICO claim are: "(1) conduct (2) of  
17 an enterprise (3) through a pattern (4) of racketeering activity  
18 (known as 'predicate acts') (5) causing injury to the plaintiff's  
19 'business or property.'" Grimmett v. Brown, 75 F.3d 506, 510 (9th  
20 Cir. 1996) (citing 18 U.S.C. §§ 1964(c), 1962).

21 Sommer's RICO claim arises out of the same operative facts as  
22 his ERISA claims from Sommer I. In the Complaint, under the RICO  
23 cause of action, Plaintiff states: "when defendants made these  
24 representations concerning their willingness to insure Plaintiff  
25 and to pay him money, should he become disabled, they knew such  
26 representations to be false . . . ." First Am. Compl. ¶ 46.

1 Although dressed in different clothes, the underlying claim is  
2 aimed squarely at Defendants' refusal to provide Sommer with  
3 disability benefits. Thus, the two suits "arise out of the same  
4 transactional nucleus of facts." Nordhorn, 9 F.3d at 1405.

5 Furthermore, relitigation of these issues would clearly  
6 impact the "rights or interests established in the prior  
7 judgment." Nordhorn, 9 F.3d at 1405. Plaintiff's disability  
8 claims were found to be barred in Sommer I. Nonetheless,  
9 Plaintiff now alleges, under the RICO cause of action, that  
10 Defendants intended to "deceive Plaintiff and thereby deprive and  
11 defraud him completely of the benefits promised under the  
12 disability policy." First Am. Compl. ¶ 46. A finding in favor of  
13 Sommer would not only impact but eviscerate the finding in Sommer  
14 I that Sommer's claims for disability benefits were barred.

15 Sommer also argues that the rights asserted in this action  
16 are different than those previously asserted.

17 Plaintiff here is not seeking to  
18 vindicate merely his own contract rights  
19 as an employee, rather, plaintiff is  
20 seeking to vindicate the rights of  
21 himself and others, in fact all citizens,  
22 to live in a civil society where  
23 businesses that must . . . be licensed by  
24 the state can not, simultaneously, be run  
as criminal enterprises. . . . One set  
of rights, the ERISA rights[,] is  
personal and contractual. The other,  
under RICO, although arising from an  
injury to person or property, vindicates  
the right of society at large to be free  
of racketeering activity . . . .

25 Opp'n at 13-14.

26 Plaintiff's distinction is not compelling. Although it is  
27 true that ERISA and RICO are designed to protect different rights,  
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1 the fact that Plaintiff's present claim is titled a RICO violation  
2 does not change the right that Plaintiff seeks to vindicate:  
3 Defendants' denial of his disability benefits. That Plaintiff is  
4 also seeking to "vindicate[] the right of society at large" does  
5 not alter this analysis.

6 In addition, in order to state a RICO claim a plaintiff must  
7 allege, in part, conduct "causing injury to the plaintiff's  
8 'business or property.'" Grimmett, 75 F.3d at 510 (citing 18  
9 U.S.C. §§ 1964(c), 1962). Because Plaintiff's claims for injury  
10 against Defendants were previously adjudicated in favor of  
11 Defendants, Plaintiff cannot now re-allege this injury.

12 Finally, "substantially the same evidence [would be]  
13 presented in the two actions." Nordhorn, 9 F.3d at 1405.  
14 Plaintiff's underlying claim in the present action is that  
15 Defendants' wrongfully denied him disability benefits. This was  
16 also the underlying claim in Sommer I. The additional evidence of  
17 the findings made by the California Department of Insurance  
18 regarding Unum was not presented at the Sommer actions.  
19 Nonetheless, this evidence is, at best, tangential to Sommer's  
20 present claim.

21 As Sommer himself concedes, his prior action was "dismissed  
22 with prejudice before trial." First Am. Compl. ¶ 26. For these  
23 reasons, the Court finds that Sommer's RICO claim is barred by res  
24 judicata.

25 **b. Unfair Business Practices**

26 "California's unfair competition statute prohibits any unfair  
27 competition, which means 'any unlawful, unfair or fraudulent  
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1 business act or practice.'" In re Pomona Valley Med. Group, 476  
2 F.3d 665, 674 (9th Cir. 2007) (citing Cal. Bus. & Prof. Code §§  
3 17200, et seq.). "This tripartite test is disjunctive and the  
4 plaintiff need only allege one of the three theories to properly  
5 plead a claim under section 17200." Med. Instrument Dev. Lab. v.  
6 Alcon Lab., CV 05-1138, 2005 WL 1926673, at \* 5(N.D. Cal. Aug. 10,  
7 2005). In the present action, Sommer has alleged unfair business  
8 practice.

9 Section 17200 also states that "a private person has standing  
10 to sue only if he or she has suffered injury in fact and has lost  
11 money or property as a result of such unfair competition." Pomona  
12 Valley Med. Group, 476 F.3d at 675 n. 12 (internal quotation marks  
13 and citations omitted). Sommer alleges that Defendants "acted  
14 without any good faith intention of actually paying plaintiff  
15 should he become disabled." First Am. Compl. ¶ 54. The injury  
16 that Sommer alleges for his § 17200 claim is an injury that  
17 directly resulted from Defendants' failure to pay his disability  
18 benefits. As has already been noted, however, the prior Sommer  
19 actions established that Defendants were not liable to Sommer for  
20 refusing to make these benefit payments. Therefore, Sommer cannot  
21 allege any injury resulting from Defendants' unfair business  
22 practices and this claim is also barred by res judicata.

23 **c. Indemnity and Punitive Damages**

24 Sommer's remaining two claims for indemnity and punitive  
25 damages are even more closely aligned with the claims raised in  
26 the prior Sommer actions. Sommer's indemnity claim states, in  
27 part, that "plaintiff is entitled to indemnification by defendants  
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1 . . . for all losses suffered and/or proximately caused by the  
2 failure of these defendants . . . to previously indemnify  
3 plaintiff . . . ." First Am. Compl. ¶ 62. Sommer's punitive  
4 damages claim states, in part, that "defendants . . . acted  
5 oppressively toward plaintiff whom they knew to be disabled with a  
6 serious brain injury. Accordingly, the acts . . . warrant[] as  
7 [sic] assessment of punitive damages . . . ." Id. ¶ 65. At the  
8 root of both claims is Defendants' denial of disability benefits.  
9 Because a final judgment was previously entered in favor of  
10 Defendants on this issue, these final two claims are also barred  
11 by res judicata.

## 12 2. Exceptions to Res Judicata

13 Sommer argues that res judicata should not apply for two  
14 reasons: the underlying judgment was obtained by fraud and there  
15 is a strong public policy reason for allowing the case to go  
16 forward.

### 17 a. Fraud Exception to Res Judicata

18 The Ninth Circuit has recognized a fraud exception to the bar  
19 of res judicata. See Costantini, 681 F.2d at 1203 n. 12 (stating  
20 that "in situations where defendant's misconduct prevented  
21 plaintiff from knowing, at the time of the first suit, either that  
22 he had a certain claim or else the extent of his injury," the  
23 fraud exception to res judicata may apply).

24 Sommer alleges that Defendants "hid from the court, and from  
25 plaintiff, the fact of it's [sic] schemes, thereby depriving the  
26 court of the opportunity to consider the case fairly and denying  
27 the plaintiff of [sic] the opportunity to present his case to the  
28

1 court at all." Opp'n at 9. These schemes, according to Sommer,  
2 were finally brought to light by the California Department of  
3 Insurance, and included numerous violations of the California  
4 Insurance Code. See Compl. ¶ 31.

5 The Court does not doubt the findings made by the California  
6 Department of Insurance regarding the actions by Unum. To the  
7 contrary, the Court finds Unum's behavior troubling, to say the  
8 least. Sommer fails to establish, however, how these findings  
9 demonstrate that "defendant's misconduct prevented plaintiff from  
10 knowing, at the time of the first suit, either that he had a  
11 certain claim or else the extent of his injury." Costantini, 681  
12 F.2d at 1203 n. 12. In other words, Sommer has not explained what  
13 fraudulent acts Unum perpetrated with respect to Sommer's specific  
14 case filed in 1996 (Sommer I). Sommer's allegations that  
15 "defendants concealed from plaintiff and this court the fact of  
16 their illegal scheme to intentionally deprive plaintiff, and other  
17 policy holders, of their rightful benefits," Mot. at 9, does  
18 little but echo the findings of the California Department of  
19 Insurance. Sommer asserts that the previous Sommer decisions were  
20 "based on partial and doctored information . . . ." The fraud  
21 exception, however, requires more than such conclusory  
22 allegations. Simply put, Sommer "has not shown the existence of  
23 any 'fraudulent concealment,' even if such a showing would permit  
24 him to avoid the bar of res judicata." Costantini, 681 F.2d at  
25 1203.

26 **b. Public Policy Exception to Res Judicata**

27 Sommer, citing California state law, also asserts that where  
28

1 a strong public policy consideration is at issue, the bar of res  
2 judicata may be lifted. In People v. Barragan, 32 Cal. 4th 236,  
3 256 (Cal. App. 2004), the California Court of Appeal "recognized  
4 that public policy considerations may warrant an exception to the  
5 claim preclusion aspect of res judicata . . . ."

6 Sommer argues that "[t]he people and businesses of this state  
7 both need and deserve a reliable, properly functioning, insurance  
8 industry." Opp'n at 11. While the Court is in full agreement  
9 with this statement, the unfortunate reality for Sommer is that  
10 his claim, even if permitted to go forward, would not ensure a  
11 properly "functioning[] insurance industry." As Sommer himself  
12 points out, the California Department of Insurance has already  
13 taken Unum to task for its treatment of the people of California.  
14 Sommer's claims reach back to the mid-90s and it is far from clear  
15 how public policy today would be benefitted by exempting the  
16 present claims from res judicata. Accordingly, the public policy  
17 exception to res judicata is not applicable to the present case.

### 18 3. Attorneys' Fees, Costs and Sanctions

19 Defendants seek attorneys' fees and costs in the amount of  
20 \$10,128.50. Burnite Decl. ¶ 2. This request is denied. The  
21 Court is convinced that Plaintiff's counsel filed the present suit  
22 in good faith. The Court notes that Plaintiff's counsel was not  
23 involved with Sommer I, Sommer II, or Sommer III. In addition,  
24 the Court understands that Plaintiff's counsel had a reasonable  
25 belief that the findings by the California Department of Insurance  
26 may have opened the door for Plaintiff to recover for what  
27 Plaintiff and his counsel believe was the wrongful denial of

1 disability benefits. Thus, the request for attorneys' fees and  
2 costs is DENIED and, for the same reasons, the Court DECLINES to  
3 impose sanctions.

#### 4 4. Vexatious Litigant

5 Finally, Defendants seek to have Plaintiff labeled a  
6 vexatious litigant. "District courts have the inherent power to  
7 file restrictive pre-filing orders against vexatious litigants  
8 with abusive and lengthy histories of litigation." Weissman v.  
9 Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999). Although  
10 vexatious litigant orders are typically imposed on pro se  
11 litigants, see id., Defendants have requested that Sommer, who has  
12 always been represented by counsel, be so labeled.

13 Mindful of the history of the prior Sommer actions, the Court  
14 declines this course of action. The Court is confident that  
15 Plaintiff and Plaintiff's counsel understand that further  
16 litigation of claims related to the denial of disability benefits  
17 to Sommer by Defendants is barred. The Court further reminds  
18 Plaintiff and Plaintiff's counsel that renewal of claims under  
19 these facts will inevitably result in consideration by the Court  
20 of attorneys' fees, costs, Rule 11 sanctions and Plaintiff's  
21 status as a vexatious litigant.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants' Motion to Dismiss is  
3 GRANTED and Defendants' Request for Attorneys' Fees and Costs is  
4 DENIED.

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6  
7 IT IS SO ORDERED.

8  
9 Dated: November 13, 2007



10 UNITED STATES DISTRICT JUDGE